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No. 02-695

In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ) is a nonprofit, public interest law firm that litigates in support of greater judicial protection of fundamental individual rights. Among those rights is economic liberty, the freedom of individuals to earn an honest living in the business or occupation of their choosing without excessive or arbitrary government interference. IJ challenges regulatory barriers to enterprise under a number of federal and state constitutional provisions, including the equal protection clause of the 14th Amendment. Because this case presents the question of the proper application of this Court's "rational basis" scrutiny under the equal protection clause, it directly affects IJ's mission and clients.

The parties in the case have consented to the filing of this amicus brief.[1]

SUMMARY OF ARGUMENT

Governmental enactments that draw lines among classes of individuals are as dangerous as they are common. In many instances, such line-drawing is benign and public-spirited. In other instances, however, the government's power to differentiate among classes in the assignment of rights or burdens is invoked by the politically

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

powerful to the detriment of the less-powerful. In such instances, judicial intervention is the only recourse.

The framers were extremely concerned about the abuse of government's power to classify and discriminate in service of what they called the "evil of faction." In the original Constitution and in subsequent amendments, a number of mechanisms were crafted to safeguard against such abuse, foremost among them the equal protection guarantee enforced through judicial review. In countless instances the courts have acted to negate governmental abuses, particularly in those categories in which the courts have applied strict scrutiny. But in areas in which the courts have applied only rational basis review, the results are uneven. Too often precious liberties are sacrificed not to legitimate governmental means and ends, but to nefarious special-interest designs effectuated through the coercive power of government. To fulfil the vital role assigned to it as a check against legislative excesses, the Court should take this opportunity to harmonize its inconsistent rational basis jurisprudence and to exercise a meaningful review of legislation that allocates unequal burdens and benefits. Far from constituting judicial activism, it is essential for this Court to assume such a role to enforce the system of checks and balances intended by the framers – and thereby to protect vital individual liberties.

ARGUMENT

I. THE COURT SHOULD APPLY MEANINGFUL RATIONAL BASIS REVIEW TO CLASSIFICATIONS DRAWN BY GOVERNMENT AMONG INDIVIDUALS.

A. In creating a national republic, few concerns animated the framers of our Constitution more than the propensity among self-interested groups of individuals to manipulate the power of government for their own ends. As James Madison argued, "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." Madison, *The Federalist* No. 10 (Modern Library College ed.) at 53. By faction, Madison meant what is considered today a special-interest group: "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 54. "The latent causes of faction are . . . sown in the nature of man," Madison explained. *Id.* at 55.

In a republic, factions are motivated to achieve their ends through legislative action. Madison had little faith in the legislature's ability consistently to resist such entreaties:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial

> determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? . . . It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good.

Id. at 56-57. Indeed, Madison warned that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," and therefore it is "against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." *The Federalist* No. 48 at 322-23.

Because faction is inherent in human nature, and efforts to restrain such passions would impair liberty, Madison concluded "that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*." *The Federalist* No. 10 at 57 (emphasis in original). "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and form of popular government, is then the great object to which our inquiries are directed." *Id.* at 57-58.

The framers' solution was to create mechanisms aimed at checking the power of majorities, thereby rendering them "unable to concert and carry into effect their schemes of oppression." *Id.* at 58. Indeed, "controlling the ability of interest groups" to secure outcomes adverse to the general interest "was a primary goal of the new Constitution," which "establishes a multitude of mechanisms to deter the efficacy of interest groups." Macey, "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model," 86 *Colum. L. Rev.* 223,

243 & 249 (1986). Structurally, those mechanisms include the separation and balance of powers, federalism, the express limitation on the powers of government, and the express reservation of individual rights. Substantively, they include the commerce, privileges and immunities, and contracts clauses of the original Constitution; and the privileges or immunities, due process, and equal protection guarantees of the 14th Amendment. As Professor Cass Sunstein has noted, those provisions are "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, "Naked Preferences and the Constitution," 84 *Colum. L. Rev.* 1689, 1689 (1984).

The equal protection clause was added to the Constitution precisely in response to such an abuse of power: the enactment by southern legislatures of the notorious Black Codes following the Civil War, which deprived newly emancipated blacks of their economic liberties. See Bolick, *Unfinished Business* (1990) at 54-57. The clause, of course, speaks in sweeping and universal terms, providing that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Sen. Jacob Howard, one of the amendment's lead sponsors, explained that the intent of the equal protection clause was to "abolish all class legislation and do away with the injustice of subjecting one caste of persons to a code not applicable to another." *Cong. Globe*, 39th Cong., 1st Sess., 1866, S. p. 2765. Another key proponent, Sen. Thaddeus Stevens, proclaimed that henceforth "no distinction would be tolerated in this purified Republic but what arose from merit or conduct." *Id.* at 65.

But such guarantees would be illusory without meaningful judicial review, a fact not lost upon the framers. As Alexander Hamilton argued, an independent judiciary provides an "excellent barrier to the encroachment and oppressions of the representative body." *The Federalist* No. 78 at 503. The specific restraints on the power of government and guarantees of individual rights, Hamilton urged, "can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *Id.* at 505.

Specifically, "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments," *id.* at 508, most notably in the "injury of the private rights of particular classes of citizens, by unjust and partial laws." Hamilton explained,

> Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

Id. at 509. In other words, meaningful judicial review of legislative line-drawing is essential not only to check excesses of the legislative branches and to safeguard individual rights, but to instill a sense of self-discipline in

the legislative branches to abide their own constitutional limits. In this way, vigorous judicial action will lead to a diminishing necessity for such review. By contrast, as Madison would predict, judicial abdication no doubt would unleash the natural propensity of government to exceed its constitutional boundaries.

Plainly, the framers of the original Constitution and the 14th Amendment intended to constrain the power of government to classify and discriminate among classes of individuals – not merely in matters of race, but with regard to vital everyday concerns such as freedom of enterprise, property ownership, and the like. Just as plainly, the framers understood that the judiciary's role in such regard must be central. At the same time, they understood the importance in a republic of judicial deference to legitimate democratic prerogatives. The design is one of delicate balance. But surely that balance is thrown off, not secured, through judicial abdication.

B. All parties to this case agree that the proper scrutiny of the legislative line-drawing at issue in this case – grossly unequal taxation of similar enterprises – is rational basis. The question this Court must answer is: which rational basis test? For though it rarely acknowledges it, the Court has applied not one rational basis test but two, thereby sowing uncertainty and confusion.

In a predominance of rational basis cases, this Court has exercised extreme deference that virtually eviscerates judicial review. Under that version of the test, the term rational basis is a misnomer, for it requires that the explanation be neither "rational" nor the "basis" for the governmental enactment. But under another set of precedents, the Court has applied meaningful rational basis

review, according substantial deference to democratic decisionmaking but not acting as a mere rubber stamp to legislative line-drawing. The esteemed late constitutional scholar Gerald Gunther characterized such review as "rational basis with bite," see Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection," 86 *Harv. L. Rev.* 1 (1972); another scholar refers to it as "measured reasonableness." Bilionis, "The New Scrutiny," 51 *Emory L. J.* 481, 513 (1992). "Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends." Gunther, 86 *Harv. L. Rev.* at 20. It is that form of meaningful rational basis review that the Iowa Supreme Court below attempted to apply, and it is the form of rational basis review that accords with original intent with respect to equal protection.

Under the most deferential rational basis review, legislation that deals with non-fundamental rights is upheld against equal protection challenge if it has "a reasonable relation to a proper legislative purpose."[2] *Nebbia v. New*

[2] This Court has recognized that the opportunity to pursue a means of livelihood is a fundamental right and one of the privileges and immunities of American citizenship. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279-81 & n.10 (1985); *United Bldg. & Constr. Trades Council v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (1984). Indeed, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" that the Constitution was designed to protect. *Truax v. Raich*, 239 U.S. 33, 41 (1915); accord, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-03 (1976). It is anomalous, then, that the Court applies the most lenient possible standard of review in assessing state action that impairs economic liberty.

York, 291 U.S. 502, 537 (1934). Deferential enough on its face, it is even less robust in operation. See *U.S. v. Carolene Products*, 304 U.S. 144, 154 (1938). The Court has placed upon the plaintiff the burden to "negative every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). The legislature is under no obligation to "actually articulate at any time the purpose or rationale" for the law or to provide evidence in support of the rationale. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Legislative decisions may be "illogical" and "unscientific," *Heller*, 509 U.S. at 321, and are sustainable even if they are "probably not true" or "not be true at all." *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991). Such a hyper-relaxed standard of review does not at all reflect the careful judicial review of legislative line-drawing envisioned by the framers, and in fact has created an "equal protection free zone" for most species of legislative action. Saphire, "Equal Protection, Rational Basis Review, and the Impact of *Cleburne Living Center, Inc.*," 88 *Ky. L. J.* 591, 608 (1999-2000). Indeed, as Prof. Bernard Siegan has observed, it would take a legislature "in a complete state of lunacy" to flunk this version of rational basis review. Siegan, *Economic Liberties and the Constitution* (1980) at 121. As Justice Stevens has observed, this relaxed standard is "tantamount to no review at all." *FCC v. Beach Communications*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

But in another line of cases, the Court has charted a still-deferential yet meaningful rational basis review. The argument for this standard was perhaps best summarized by Justice Jackson in his concurring opinion in *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring):

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Thus understood, the rationality requirement is "a requirement that regulatory measures be something other than a response to public pressure." Sunstein, "Interest Groups in American Public Law," 38 *Stanford L. Rev.* 29, 49 (1985).

Meaningful equal protection rational basis review traces back to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), decided decades before the Court announced the dichotomy between fundamental and non-fundamental rights in *Carolene Products*, *supra*. In *Yick Wo*, the Court analyzed a seemingly innocuous San Francisco ordinance that required laundries to be constructed of brick. But the law was procured by certain laundry owners to the economic detriment of other (primarily Chinese) establishments.

Declared the Court, "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the Constitution." *Id.* at 373-74.

More recently, the Court in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court applied rational basis review to unanimously strike down an ordinance that singled out homes for the mentally retarded for a requirement of obtaining a special use permit. Although acknowledging that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes," the Court declared that the equal protection clause is "essentially a direction that all persons similarly situated should be treated alike." *Id.* at 439-440; see also *id.* at 452 (Stevens, J., concurring) ("the word rational – for me at least – includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially"). The standard the Court applied required a showing that the group singled out for adverse treatment possesses "distinguishing characteristics" that justify a "distinctive legislative response," *id.* at 443 (opinion of the Court), and that the law actually is "based on [that] distinction." *Id.* at 449.

In implementing this equal protection standard, the Court scrutinized the law from multiple perspectives. First, it found that "the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests." *Id.* at 448. Second, it concluded that "mere negative attitudes, or fear,

unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for differential treatment. *Id.* Third, any bases for differentiation must actually be tailored to the "special hazard" to an extent that justifies denying to some individuals what is available to others. *Id.* at 449; see also *id.* at 452 n.4 (Stevens, J., concurring) ("'I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature'") (citation omitted).

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court struck down on rational basis grounds a zoning law limiting occupancy of dwelling units to members of a nuclear family.[3] Writing for the plurality, Justice Powell declared that the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499 (plurality). Justice Powell acknowledged that the city's concerns about congestion, overcrowding, and the burden on city services were "legitimate," but concluded that the ordinance was invalid because it served the city's objectives "marginally at best." *Id.* at 500.

In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated a Colorado initiative that forbade municipalities from enacting anti-discrimination laws to protect homosexuals. Equal protection was triggered, the Court

[3] The case was decided under the due process clause, which encompasses the same rational basis test, but could have been decided under equal protection given the lines drawn between groups of individuals.

ruled, because homosexuals, "by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres." *Id.* at 627. The Court described the applicable standard:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . [But] [b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Id. at 632-633. This standard articulates precisely the careful balance contemplated by the framers.[4]

[4] The Court in *Romer*, *id.* at 632-33, distinguished decisions that sustained regulations under the rational basis test by noting that "[t]he laws challenged in the cases just cited were narrow enough in scope and *grounded in a sufficient factual context* for us to ascertain some relation between the classification and the purpose it served" (emphasis added). That suggests that the Court always will insist upon some sort of factual record to sustain a finding of rational basis.

In *Romer*, the law evoked judicial skepticism because it "singl[ed] out a certain class of citizens for disfavored legal status or general hardships," which effects "a denial of equal protection of the laws in the most literal sense." *Id.* at 633. In applying the standard, the Court found that with regard to the government's alleged interests, the law was "at once too narrow and too broad," *id.*; and indeed the "breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* at 635. Accord, *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992) (justification not credited where "the facts precluded any plausible inference" to sustain it).

The cases applying meaningful rational basis scrutiny consistent with the framers' intent yield at least five judicially manageable principles:

1. The courts should defer to legitimate democratic judgments. "The avoidance of ultimate value judgments about the legitimacy and importance of legislative purposes [should] make the means-focused technique a preferred constitutional ground for a less interventionist Court." Gunther, 86 *Harv. L. Rev.* at 21-22.

2. However, where government singles out discrete groups of individuals for special burdens or benefits, the courts should view such classifications with skepticism, and insist upon record evidence showing a legitimate governmental interest and that the means employed are rationally related to that interest. Such review would "ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefitted – or, to state the matter positively, to ensure that representatives have exercised some sort of judgment instead

of responding mechanically to interest-group pressures." Sunstein, "Interest Groups in American Public Law," 38 *Stanford L. Rev.* 29, 69 (1985). Courts should "gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing." *Gunther*, 86 *Harv. L. Rev.* at 21.

3. Some governmental interests are illegitimate. See, e.g., *Cleburne*, 473 U.S. at 450 (giving effect to "irrational prejudice"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("economic protectionism" is not a legitimate governmental objective).

4. The record must disclose some special threat posed by the disadvantaged group that merits a distinctive legislative response. See *Cleburne*, *supra*.

5. Classifications that are overbroad or underinclusive suggest that the reasons advanced for the classification are pretextual. See *Yick Wo* and *Romer*, *supra*.

Those standards, derived from the original understanding of equal protection and from this Court's decisions in *Yick Wo*, *Cleburne*, *Moore*, and *Romer*, would safeguard the rights and opportunities of discrete groups of individuals against discriminatory state legislation adopted for protectionistic ends. They form a balanced and workable rational basis framework by which the courts should assess all instances of government-drawn classifications that assign different benefits and burdens to different classes of individuals.

C. This Court has articulated multiple rationales for a highly deferential rational basis test. It presumes that legislative errors are the result of, and generally are correctable through, democratic processes. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It assumes that legislatures are more competent to determine where lines among classes of citizens should be drawn than are courts. See, e.g., *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). And it presumes that any more exacting standard would be judicially unmanageable. See, e.g., *FCC v. Beach Communications*, *supra*, 508 U.S. at 314. Whether those presumptions are correct or not, none justifies a standard of review so lax that it sanctions unfettered legislative power to discriminate among classes of individuals for arbitrary, irrational, or nefarious purposes.[5]

The first premise – deference to democratic processes – is inapt, because it was precisely the abuse of normal democratic processes, through their manipulation by special interests, that the framers sought to prevent. Democratic processes are inherently susceptible to what the framers referred to as the "passions" of factions, whose intensity of interest can override majority will or the interests of the public as a whole. The ultimate safeguard

[5] Indeed, even some of the most deferential decisions recognize that judicial intervention is warranted where "the varying treatment of different groups or persons is so unrelated to the achievement of . . . legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance*, 440 U.S. at 97; see also *Heller*, 509 U.S. at 321 ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation").

against such abuse is limited judicial review, which by demanding some semblance of "fit" between legitimate ends and means can ferret out self-interested from public-spirited legislative line-drawing.

In practical reality, it can be argued that "[t]he preferences of the 'majority' are virtually irrelevant in determining legislative outcomes. Instead, law is made by legislators whose primary goal is to aggregate the political support they receive from competing special interest group coalitions." Macey, "Public Choice: The Theory of the Firm and the Theory of Market Exchange," 74 *Cornell L. Rev.* 43, 60 (1988). What is even more clear is that the degree of judicial scrutiny is central in determining the extent to which special-interest groups will be able to manipulate legislative processes to their own ends:

> Where techniques of statutory construction raise the probability that certain interest group oriented statutes will be invalidated by courts, . . . the value of – and hence the demand for – special interest legislation declines. Similarly, of course, as the probability that a statute will be invalidated as unconstitutional goes up, the willingness of interest groups to pay for it goes down. As judicial deference to legislatures goes up, as it has in recent years, one would expect the demand for legislation by interest groups to rise as well.

Id. at 57. When the pendulum shifts too far in favor of judicial deference, the result is to unleash special-interest

domination of democratic processes in precisely the ways the framers feared.[6]

Moreover, even if the premise of democratic correctability was true at one time, it is not today. Governments at every level have proliferated in number and scope to such an extent that one commentator has observed that America is now the "most 'governed' state in the world." Anton, *American Federalism and Public Policy* (1989) at 4. Many governing bodies that touch the lives of every American – from zoning boards to boards of education to regulatory agencies – are often appointed, virtually invisible, and largely unaccountable through direct democratic processes. To hold that a citizen aggrieved by discrimination at the hands of such agencies is limited to recourse through democratic processes is, in most instances, to hold that no real remedy exists at all.

The second and third premises – judicial incompetence and unmanageability – also are faulty. A more rigorous rational basis review does not call upon the courts to perform the legislative function of choosing among competing policy alternatives. Rather, it calls upon the courts to perform the most basic and essential judicial function: reviewing governmental impositions that discriminate among classes of individuals to determine

[6] That phenomenon has led to corrective efforts to restrain campaign spending and contributions. Madison viewed efforts to restrain the liberty of factions as incompatible with a free society, preferring institutional restraints that would prevent factions from manipulating government power for their own ends. See *The Federalist* No. 10 at 54-55. But to the extent that courts abdicate their essential role in enforcing those institutional restraints, it will increase the demand for after-the-fact corrective mechanisms.

whether the legislature has exceeded its constitutional boundaries.[7] Though in an ideal world the legislatures would limit themselves, in reality the natural temptation is to appease special interest pressures and test the outermost boundaries of proper legislative power. The framers understood and forecast precisely that impulse, they recognized that it would manifest itself most injuriously in class legislation sought not for the public good but for private gain, and they assigned to the judiciary the role of policing abuses and safeguarding individual rights. Fulfilling that role is not judicial activism; abdicating it is.

Indeed, the courts perform precisely that function in other jurisprudential contexts. Courts frequently are called upon to define the scope of the police power, and to delimit its exercise. In determining whether a legislative enactment is encompassed within the police power, the Court insists upon "substantial evidence." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). In cases under the dormant commerce clause raising claims of discriminatory burdens, the courts balance the asserted interests of the state against the impact on interstate

[7] Even Judge J. Skelly Wright, an advocate of "judicial retreat" from review of administrative decisionmaking (see Wright, "Judicial Review and the Equal Protection Clause," 15 *Harv. Civ. Rts. – Civil Liberties L. Rev.* 1, 4 (1980)), argued that "the principle of equality before the law is peculiarly appropriate for judicial implementation." Noting that the motto " 'equal justice under law' was chiseled into the facade of the present Supreme Court building," Skelly observed that democratic processes are not calculated to achieve the equal treatment required by law. "To decide whether official action accords equal treatment is a task especially congenial to the judicial temperament. And, because it comes naturally and involves few basic policy choices, judges tend to perform the function well." *Id.* at 19.

commerce. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The courts likewise conduct a means/ends analysis with regard to congressional power under the commerce clause. See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995). In cases involving alleged regulatory takings, the courts determine whether a "rough proportionality" exists between the costs occasioned by a proposed development and the regulatory burdens sought to be imposed by government. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994). All of those judicial inquiries are similar to the equal protection analysis applied by this Court in *Yick Wo*, *Cleburne*, *Moore*, and *Romer*. The standard is at once appropriately deferential to democratic prerogatives, yet at the same time appropriately robust in the protection of individual liberties.

All agree that rational basis is the correct test to review legislative classifications that benefit one group and disadvantage another. The only question is whether it is a true rational basis test, in which the Court insists at least upon both a reason and a basis, or a mere rubber stamp. In reviewing the decision below, this Court should apply meaningful rational basis review, rather than allow the legislature *carte blanche* authority to discriminate among enterprises in the imposition of taxes without any real limits or constitutional accountability.[8] In the enjoyment of their

[8] Such a meaningful inquiry accords with a long line of cases striking down discriminatory taxation on equal protection grounds. See *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Phillips Chemical Corp. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960); *Williams v. Vt.*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985);

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most basic rights, Americans cannot feel secure absent the constant vigilance of the courts.

II. IF THE COURT DISAGREES WITH THE IOWA SUPREME COURT, IT SHOULD REMAND THE CASE FOR INDEPENDENT REVIEW UNDER THE IOWA CONSTITUTION.

The Iowa Supreme Court based its determination on both federal and state equal protection grounds, relying heavily on precedents from Iowa[9] and other states. It is a cornerstone of our federalist system that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). The Iowa Supreme Court concluded that the equal protection guarantees of the state and federal constitutions were coextensive. Should this Court diverge from the Iowa Supreme Court's articulation of federal equal protection standards or their application to the facts of this case, the Court should, as a matter of judicial comity and respect for federalism, remand the case to the Iowa Supreme Court to consider the case under state equal protection principles. This Court should not assume that the highest court of a state would automatically accede to a narrower construction of equal protection guarantees in its own constitution merely

Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989).

[9] See, e.g., *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980); *Gleason v. City of Davenport*, 275 N.W.2d 431 (Iowa 1979).

because a similar provision in the federal constitution is narrowly construed.

CONCLUSION

Because the Iowa Supreme Court's application of both federal and state equal protection principles are in accord with the intent of the framers of our federal Constitution, the proper course of action is to affirm the decision below.

Respectfully submitted,

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